

5-2015

Montana Expands Psychotherapists Privilege, Matching Federal Rules

Cynthia Ford

Alexander Blewett III School of Law at the University of Montana, cynthia.ford@umontana.edu

Follow this and additional works at: http://scholarship.law.umt.edu/faculty_barjournals



Part of the [Health Law Commons](#), and the [Medical Jurisprudence Commons](#)

Recommended Citation

Cynthia Ford, *Montana Expands Psychotherapists Privilege, Matching Federal Rules*, 40 Mont. Law. 12 (2015),
Available at: http://scholarship.law.umt.edu/faculty_barjournals/100

This Article is brought to you for free and open access by the Faculty Publications at The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Faculty Journal Articles & Other Writings by an authorized administrator of The Scholarly Forum @ Montana Law.

Montana expands psychotherapist privilege, matching federal rules

By Cynthia Ford

On April 2, Gov. Steve Bullock signed House Bill 513 into law, effective immediately. This constitutes a substantive amendment to the statutory provisions on privileges in our state's courts, extending the protection previously given only to psychologist-patient communications to a much broader range of mental health providers¹. As a result, Montana now offers the same privilege for communications by a person seeking mental health care as the federal system does.

The amended statute

The title of M.C.A. 26-1-807 has been changed from "Psychologist-client privilege" to the more inclusive "Mental health professional-client privilege." The text of the statute was amended to cover communications between clients and mental health professionals on both ends of the spectrum: psychiatrists, licensed clinical social workers, and licensed professional counselors, as well as psychologists (which previously was the only category covered by this statute).

First-term Rep. (and third-year law student²) Andrew Person sponsored House Bill 513. Its original form added two new categories of protected mental health professionals: psychiatrists and licensed clinical social workers.³ This version would have matched Montana exactly with the U.S. Supreme Court's form of the psychotherapist privilege, which I will explain below. The final version of the bill added a third new category, licensed professional counselors, and was made as a result of testimony at the hearing⁴ on the bill before the House Human Services Committee.

The full text of the enacted bill, amending M.C.A. 26-1-807, follows:

AN ACT REVISING LAWS REGARDING
PRIVILEGED COMMUNICATIONS BETWEEN
MENTAL HEALTH PROFESSIONALS AND
CLIENTS; AMENDING SECTION 26-1-807,

MCA; AND PROVIDING AN IMMEDIATE
EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF
THE STATE OF MONTANA:

Section 1. Section 26-1-807, MCA, is amended to read:

"26-1-807. Psychologist-client Mental health professional-client privilege. The confidential relations and communications between a psychologist, psychiatrist, licensed professional counselor, or licensed clinical social worker and a client must be placed on the same basis as provided by law for those between an attorney and a client. Nothing in any act of the legislature may be construed to require the privileged communications to be disclosed."

Section 2. Effective date. [This act] is effective on passage and approval.

In my view, the enactment of this bill is a big improvement in Montana law, providing clarity for lawyers and serving the larger public good of promoting mental health care for all of Montana's citizens. It also removes any discrepancy between the state and federal systems with regard to protection from compelled disclosure of communications made by client-patients to all forms of licensed mental health providers.

The further addition of licensed professional counselors

Matt Kuntz, executive director of the Montana chapter of the National Alliance on Mental Illness, educated me and the House Committee when he explained in his testimony on HB 513 that Montanans seeking mental health care also regularly access licensed professional counselors (L.P.C.s) for the same reasons that apply to LCSWs (Licensed Clinical Social Workers): economy, accessibility, and professional regulation by the state. He suggested that the bill be amended to cover LPCs on the same basis as LCWs.

After the House committee hearing, I investigated the current legal status of LPCs in Montana. It turns out that the Montana Code often discusses them in the same breath as LCSWs. For example:

2-15-1744. Board of social work examiners and professional counselors. (1) (a) The governor shall appoint, with the consent of the senate, a board of social work examiners and professional counselors consisting of seven members.

1 The privilege actually belongs to the client/patient of the provider, but the variable here is the status of the provider so courts, and I, usually designate the privilege by the type of provider rather than the more cumbersome "client and his/her psychiatrist."

2 When he returns to school, Andrew will receive a big gold star.

3 For the exact wording of the several versions of this bill, see <http://leg.mt.gov/bills/2015/hb0599/>

4 The very interested can access video and audio recordings of the testimony at <http://leg.mt.gov/css/Video-and-Audio/archives/av.asp>. The testimony on this bill starts at 12:06. HB 513 was the least exciting agenda item that day, sandwiched between bills about investigation of assaults on patients at the Montana Development Center in Boulder for the developmentally delayed and about Medicaid expansion. There were no T-shirts worn by members of the audience which related to the change in the law of evidence.

(b) Three members must be licensed social workers, and three must be licensed professional counselors.

(c) One member must be appointed from and represent the general public and may not be engaged in social work....

Title 37, Chapter 22 of the Code governs social workers; Chapter 23 governs the profession of counseling. The first statute of that chapter acknowledges the important role of licensed professional counselors and professionals and describes the purpose of the chapter:

37-23-101. Purpose.

(1) The legislature finds and declares that because the profession of professional counseling profoundly affects the lives of people of this state, it is the purpose of this chapter to provide for the common good by:

(a) ensuring the ethical, qualified, and professional practice of professional counseling; and

(b) instituting an effective mechanism for obtaining accurate public information regarding an applicant's criminal background:

(i) to prevent convicted criminal offenders who committed crimes relevant to working with children, the elderly, the mentally ill, or other vulnerable persons from obtaining a Montana professional counseling license as an attempt to gain access to and perpetrate crimes against new victims; and

(ii) to protect the state from claims of negligence.

(2) This chapter and the rules promulgated by the board under 37-22-201 set standards of qualification, education, training, and experience and establish professional ethics for those who seek to engage in the practice of professional counseling as licensed professional counselors.

In order to obtain a license as a professional counselor, the applicant must first have completed a graduate program of at least 60 hours and a minimum of 3,000 hours of supervised counseling practice. In comparison, LCSWs must have either a master's or doctorate degree from an accredited program and also "24 months of supervised post-master's degree work experience in psychotherapy, which included 3,000 hours of social work experience, of which at least 1,500 hours were in direct client contact, within the past 5 years." M.C.A. 37-22-301. Both LCSWs and LCPCs must pass examinations and criminal background checks. Thus, there are similar and rigorous requirements for both of these categories of mental health professionals, and both are subject to ongoing state regulation.

My next avenue of research was empirical, if informal: I

pulled my Missoula telephone directory from its musty⁵ place in the kitchen cupboard above where my landline⁶ telephone used to live and looked up "Counseling Services." This highly unscientific survey revealed 13 entries for LCSWs; 16 for LPCs; 3 for Ph.Ds. (I presume these are psychologists); and 1 that listed both an LPC and Ph.D. I then checked the directory under "Psychologists," and found that 22 of the 30 listings indicated that the person had a Ph.D. Thus, Mr. Kuntz's testimony seems accurate: Mental health providers are pretty evenly split between MSWs, LPCs and Ph.Ds. If we want to increase mental health by encouraging clients to communicate fully with their providers, it makes as little sense to differentiate between MSWs and LPCs as it did to privilege Ph.Ds. but not MSWs.

In my earlier article⁷ on the psychotherapy privilege, and in my House testimony, I had overlooked the importance of LPCs as a resource by examining only the differences between the Montana privilege statute and the federal common law on psychotherapy providers, neither of which mentioned these folks. I was convinced by Mr. Kuntz's experience-based assertion that mentally ill Montanans use LCSWs and LPCs approximately equally, and that those clients have no idea about the difference between, much less the potential divergent evidentiary treatment of, the two categories of providers. The Legislature apparently was also convinced, and added this class of mental health practitioners to the list of providers protected by the amendment to M.C.A. 26-1-807 before the bill was passed. As a result, Montana state courts now will prohibit disclosure⁸ of the communications made by a client to his or her mental health professional, whether that professional is a psychologist, psychiatrist, licensed clinical social worker or licensed professional counselor.

Montana v. federal psychotherapist privilege law now

This amendment effectively brings Montana's treatment of the communications between mental health providers and their clients into line with federal law in the Ninth Circuit. As I wrote in the earlier column, the U.S. Supreme Court (which is the source of federal privilege law, per F.R.E. 501) recognized a broad psychotherapist-patient privilege for communications between clients and licensed psychiatrists, psychologists, and licensed clinical social workers. *Jaffee v. Redmond*, 518 U.S. 1, 15-17, 116 S. Ct. 1923, 1931-32, 135 L. Ed. 2d 337 (1996). Montana's new version of the statutory privilege includes all

Evidence, next page

5 I had almost forgotten the existence of this directory; I look up most things on my Maps application or on the Internet. (I am actively unfond of Siri, even after I changed her annoying voice to a much more attractive Australian male).

6 I had thought no one in the world still retained a landline, urban me. However, this past weekend, I helped with lambing-related chores on a friend's ranch outside Cascade, where the cell service stopped approximately at the paved road, 18 miles north of the ranch. Once I got back to the highway late Sunday, my pocket erupted with chirps, buzzes and rings.

7 Montana Lawyer, October 2014, Vol. 40, Issue 4.

8 The privilege belongs to the client/patient, not the provider. It is up to the client to assert the privilege. If the client voluntarily discloses what she said to her L.C.S.W., the privilege will be waived and the opponent may access the remainder of that conversation, and perhaps all of the conversations between them. When in doubt, "Object! Privilege. M.C.A. 26-1-807."

Evidence, from previous page

three of these categories. Thus, Montanans using the mental health services of any of these three types of providers can make full revelations without fear of later having those disclosures repeated in court, either state or federal.⁹

The *Jaffee* opinion did not discuss the treatment of licensed professional counselors, neither explicitly including nor excluding them from the privilege. However, the majority's explanation for including licensed clinical social workers in the psychotherapy privilege seems to apply equally to licensed professional counselors:

All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists¹⁰ and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. See, e.g., U.S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994, pp. 85-87, 107-114; Brief for National Association of Social Workers et al. as *Amici Curiae* 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, *id.*, at 6-7 (citing authorities), but whose counseling sessions serve the same public goals. Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers. We therefore agree with the Court of Appeals "[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." *Jaffee v. Redmond*, 518 U.S. 1, 15-17, 116 S. Ct. 1923, 1931-32, 135 L. Ed. 2d 337 (1996).

The same considerations appear to apply to licensed professional counselors, and thus my educated guess is that eventually federal common law will evolve to include LPCs in the federal psychotherapy privilege. Indeed, *Jaffee* expressly left definition of the contours of this privilege to development on a case-by-case basis. *Id.* at 1932.

The Supreme Court has not yet decided any post-*Jaffee* case involving licensed professional counselors or other categories of mental health providers not listed in *Jaffee*, but a quick look at decisions from lower federal courts shows that the issue is percolating there. E.g., "The court uses the term 'psychotherapist' generically to include a psychologist, psychiatrist, counselor or other mental health therapist." *LeFave v. Symbios, Inc.*, No. CIV.A. 99-Z-1217, 2000 WL 1644154, at *3 (D. Colo. Apr. 14, 2000).

9 In my review of the tribes' evidence provisions (Montana Lawyer, February 2015 and March 2015), I did not notice any specific psychotherapist privilege in any tribal system. However, to the extent a tribe invokes state or federal law when its tribal law is silent, I would expect the same protection in tribal court as well.

10 Remember that there is no doctor-patient privilege in federal court, so that the only protection for disclosures to a psychiatrist M.D. is through this psychotherapist privilege. Where the doctor-patient privilege is recognized, a psychiatrist's sessions should fit under that umbrella. [Ford, not Supreme Court, footnote]

A prime example started in our own District of Montana. Robert Romo was convicted of threatening President George W. Bush. The letter he allegedly sent to the president was not introduced at trial; instead, a White House administrator testified that in the immediate aftermath of 9/11, all mail sent to the president for the next several months was diverted to a warehouse (to prevent delivery of anthrax) and that thousands of items (presumably including Romo's missive) remained there, unexamined. The trial evidence also included testimony from a licensed professional counselor to whom Romo "blurted out" a confession that he had made a threat against the president.

This case arises out of a confession Romo made during a meeting with Donald LaPlante, the program director at the Dawson County Adult Correction and Detention Facility where Romo was incarcerated. LaPlante is a licensed professional counselor whose job included providing inmates with psychological counseling and a host of other duties, ranging from arranging social events to providing classes and acting as a case manager. Before the meeting that sparked the chain of events leading to Romo's conviction, LaPlante had provided Romo with mental health treatment during voluntary counseling sessions.

In October 2002, Romo requested a meeting with LaPlante. Although Romo did not have a counseling session scheduled and LaPlante did not know why Romo wanted to see him, the two met in a private visitation room at the detention facility. Romo immediately confessed that he had written a threatening letter to the president. Before Romo went any further, LaPlante warned that he would have to report the letter to law enforcement officials. Despite the warning, Romo went on to tell LaPlante exactly what he had written: that someone should put a bullet in the president's head and he would be the person to do it. Romo also told LaPlante that he had mailed the letter to the White House.

After the meeting, LaPlante called the Secret Service and reported to Agent David Thomas that Romo had sent a threatening letter to the president. LaPlante's call prompted Agent Thomas to interview Romo. Agent Thomas gave Romo his Miranda warnings. Romo repeated to Agent Thomas what he told LaPlante, that he had written and mailed a letter to the president stating that someone should put a bullet in the president's head and he was willing to do it. Romo elaborated that he would try to punch, hit, or shoot the president if the president came to the jail. *United States v. Romo*, 413 F.3d 1044, 1045-46 (9th Cir. 2005).

Judge Haddon overruled the defense motion in limine to preclude the counselor's testimony. Romo appealed his conviction, arguing, *inter alia*, that his communication to licensed professional counselor LaPlante was privileged under *Jaffee*.

The Ninth Circuit held, 2-1, that Judge Haddon was correct and that the communication was not privileged. The *Romo* majority based its holding on the purpose of the communication by Romo to LaPlante:

Under *Jaffee*, to invoke the benefit of the privilege, Romo bears the burden of showing that 1) LaPlante is a licensed psychotherapist, 2) his communications to LaPlante were confidential, and 3) the communications were made during the course of diagnosis or treatment. As the contact between Romo and the therapist was not for diagnosis or treatment, this appeal can be

resolved on the basis of the third element. *United States v. Romo*, 413 F.3d 1044, 1047 (9th Cir. 2005).

Judge Betty Fletcher (sadly and dearly departed) concurred in the result, but “disagree[d] with the majority’s conclusion that Romo’s communications did not occur in the course of diagnosis or treatment.... When a patient contacts his therapist, with whom he has an ongoing patient-therapist relationship, to discuss a problem the patient is having and the patient and therapist subsequently meet and discuss the problem the resulting conference is a counseling session. This is exactly the course of events that occurred between Romo and his therapist LaPlante. To conclude otherwise disregards the reality of the psychiatrist-patient relationship and the nature of psychiatric treatment.” 413 F.3d at 1052-1053. (9th Cir. 2005).

Judge Fletcher concurred because she concluded that the counselor’s testimony mirrored that of the Secret Service Agent, and thus the error was harmless.

The startling thing about *Romo* is the underlying assumption, without citation, in both the Ninth Circuit’s majority and concurring opinions that the licensed professional counselor, if diagnosing or treating, should be extended privilege on the same basis as psychiatrists, psychologists and licensed clinical social workers. Judge McKeown, writing for the majority, did not specifically address the distinction; Judge Fletcher specified her “agreement” that the psychotherapist privilege applied to licensed professional counselor LaPlante:

The Supreme Court affirmed a patient-psychotherapist privilege under Rule 501 of the Federal Rules of Evidence in *Jaffee v. Redmond*, 518 U.S. 1, 15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). The requirements of the privilege are: (1) the communications must be confidential; (2) the therapist must be a licensed psychotherapist; and (3) the communications must occur in the course of diagnosis or treatment. *Id.* I agree with the majority that the first two factors are not in doubt. LaPlante is a licensed psychotherapist and Romo’s communications to LaPlante were confidential. I disagree with the majority’s conclusion that Romo’s communications did not occur in the course of diagnosis or treatment. (Emphasis added) 413 F.3d at 1052.

Thus, all three members of the Ninth Circuit panel assumed that *Jaffee* extends to licensed professional counselors. The Supreme Court denied cert¹¹ to Romo, so it stands as the federal law in our District and Circuit. If, later, the U.S. Supreme Court does take a case on this issue, this time it can accurately include Montana in its list of states that expressly privilege communications made to a licensed professional counselor.¹²

Conclusion

For the first time ever, most mental health providers in

Montana can confidently tell their clients that the communications between them are privileged in both Montana and federal courts, in addition to being subject to the providers’ professional duties of confidentiality. I previously wrote:

The Legislature should clarify the status of the mental health privilege, and if it concludes that social workers are entitled to a privilege, expand M.C.A. 26-1-807 to include licensed clinical social workers as well as psychologists and psychiatrists. In the meantime, Montanans who wish to keep their disclosures to a mental health practitioner privileged should go to psychologists, and not to either psychiatrists or social workers.

This warning is no longer necessary. By removing the disparate treatment between the systems, the 2015 amendment to M.C.A. 26-1-807 should increase the confidence of clients in the mental health care system, and thus increase the overall health of Montanans.

Still, there is a caveat. In Montana, where privilege is strictly limited to the relationships specified by statute, it behooves a client at the outset of a counseling relationship to be sure that the provider falls within one of the categories privileged under the amended statute: psychiatrist (medical doctor), psychologist (Ph.D.), licensed clinical social worker (LCSW), or licensed professional counselor. When I scanned the Missoula phone directory in my quick quantitative survey, I found several listings which did not indicate the exact qualification, such as “Courage to Change,” “Choices for Change,” “Therapy Village,” and one law firm (?). If I were a client, prior to beginning treatment I would ask for the exact form of licensure of the treating person in one of these places, to be sure that my communications with that person qualified for privilege.

Remember Lucy in “Peanuts”? Look what I found on Amazon: “**The Doctor is In: The Peanuts Psychiatric Help Kit (Peanuts (Running Press))**.”¹³ For only \$422.65 (I checked this price twice! but it is a lot cheaper than years of schooling, and a lot easier than taking an exam), this is what you get:

Now anyone can turn to that wellspring of psychiatric wisdom that the Peanuts gang turns to when things go wrong: Lucy Van Pelt. She tells it like it is and collects every nickel she can for it. With this kit Peanuts fans and would-be therapists can set their own price and start collecting on their words of wisdom. We could all use a little advice sometimes, and no one offers help to distressed souls like Lucy. Feeling nervous? “Learn to relax... five cents, please!” Feeling depressed? “Snap out of it! Five cents, please.” Scared? “You’re no different from anyone else... Five cents, please!” *The Doctor Is In* offers a replica of Lucy’s own coin collection can and a 64-page book of classic Peanuts comic strips filled with Lucy-style wisdom to bring solace to the most troubled minds.

¹¹ 547 U.S. 1048 (2006).

¹² In my earlier article on the Psychotherapy Privilege, I spent some ink on the inaccurate statement by Justice Stevens that Montana was among the states that included licensed clinical social workers in its privilege law. Now, he is not wrong, thanks to the 2015 Montana Legislature and specifically Rep. Person.

¹³ <http://www.amazon.com/The-Doctor-In-Peanuts-Psychiatric/dp/0762435747>

Joseph R. Marra

GREAT FALLS —Joseph R. Marra died of natural causes on April 14, 2015.

Joseph was born in Havre on Jan. 25, 1924, to Frank and Mary Marra, who also had two other children, Anthony J. and Norine Marra, who predeceased him. Joseph Marra graduated from Havre High School in 1941 and attended Northern Montana College for one year. He enlisted in the Navy at 18 in 1942, from which he was honorably discharged in 1946. He then attended the University of Illinois and graduated from the University of Montana law school in 1951. He practiced law in Great Falls from 1951 until he retired.

During that time, the Montana Supreme Court appointed him to serve on the Civil Rules Commission in 1970 where he served until shortly before his retirement. The court appointed him chairman of the first Reapportionment Commission in 1973,

and its representative on the Judicial Nominating Commission where he served for 11 years. He was a member of the American Bar Association Legislative Committee. He was president of the Cascade County Bar Association and received the first Edward C. Alexander award for professionalism and integrity.

Joseph married Norma Grassechi of Black Eagle on June 6, 1949, who predeceased him. They had four sons, Frank of Boise, Idaho; Tom (Antonia) of Great Falls; John (Ann Marie) of Honolulu; and Paul (Lonny) of Hollywood, Calif., all of whom survive. Also surviving are four grandchildren and two great-grandchildren.

He married June L. Wilder in 1999, and she died Nov. 24, 2014. He played with the Great Falls Symphony for many years and would prefer that donations in his name be made to the Great Falls Symphony, 11 3rd St. N., Great Falls, MT 59401.

Condolences for the family may be posted online at www.schniderfuneralhome.com.

Clifford Edward Schleusner

Cliff was born the oldest of 11 children on his parents' homestead 30 miles north of Saco (12 miles south of the Canadian border), on Feb. 15, 1918. He graduated from WhiteWater High School in 1935 and Northern Montana College-Havre in 1941. He taught school in Box Elder for one year, then enlisted and served as a decorated member of



Schleusner

the Army Air Force until 1946. He was in the 31st Squadron, 5th Bomb Group, Samar Island, Philippines, on VJ Day, Sept. 2, 1945. After the war, he attended law school in Montana, graduating in 1951.

Cliff's legal career spanned 63 years. He worked for the U.S. Attorney's office, the Yellowstone County Attorney's office and ran a private practice, sharing office space with George Radovich from 1980 until retirement on Dec. 31, 2014.

Cliff was a true Montana outdoorsman: hunting, camping, exploring, fishing, prospecting and downhill skiing along with many other activities. Cliff was a founding member of Red Lodge Mountain and the Beartooth Ski Patrol and skied into his 80s, enjoying the mountains all his life. Cliff was a skilled musician, playing many instruments including his specialty,

the harmonica. He played fiddle in a local bluegrass band and attended fiddle camps all over the state, even in his later years. Cliff was a life master of bridge, a chess master, a wonderfully skillful pool player, and he was one of the most knowledgeable Montana historians. Cliff was a dedicated member of numerous service and fraternal organizations, including the Masonic Ashlar Lodge #29, the Masonic Scottish Rite, VFW Post #6774, and Kiwanis, to name only a few.

One of the proudest moments of Cliff's life was giving a kidney to his brother Kenneth in 1966. Kenneth survived until 2012 when he died of natural causes not associated with any kidney problems. On Feb. 23, 2015, Cliff passed the same way he lived his life — with independence, dignity and grace, conveying his wishes to his doctors until the very end. At age 97, his death was due to complications from a fall at his home.

Cliff has two surviving siblings: Idelia Vaupel of Florida and Hattie Engstrand of Washington. He was an honorary member of the Radovich family, spending many happy years participating in family holidays, celebrations and ski trips to Big Sky.

He is preceded in death by his parents, his brothers, Kenneth and Wilbur, and sisters Margaret, Clara and Sally. Three babies died in infancy.

Memorials may be made to Cliff's second home, the VFW Post No. 6774, 637 Anchor Ave., Billings, MT 59105.

Evidence, from page 15

So, beware: If your provider, or your witness, has one of these kits rather than a framed license from the State of Montana as a psychologist, psychiatrist, professional counselor or licensed clinical social worker, any disclosure made still can be compelled at trial, no matter how helpful the session was. If the provider

has an actual license in one of these categories, no matter how informal the office, you should win your motion in limine to exclude his or her testimony at deposition or trial in both state and federal cases. Good work, Andrew Person!

Cynthia Ford is a professor at the University of Montana School of Law where she teaches Civil Procedure, Evidence, Family Law and Remedies.